



## Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

# HARVARD LAW REVIEW.

---

VOL. XXIV.

JUNE, 1911.

NO. 8.

---

## THE SCOPE AND PURPOSE OF SOCIO- LOGICAL JURISPRUDENCE.

### I.

#### SCHOOLS OF JURISTS AND METHODS OF JURISPRUDENCE.

UNTIL recently, it has been possible to divide jurists into three principal groups, according to their views of the nature of law and of the standpoint from which the science of law should be approached. We may call these groups the Philosophical School, the Historical School, and the Analytical School.<sup>1</sup> On closer analysis, the Philosophical School falls into three: an Eighteenth-Century Law-of-Nature School, perhaps still represented by a Rousseauist School in France,<sup>2</sup> and not without representatives in American juristic thought,<sup>3</sup> a Metaphysical School, dominant in

---

NOTE.—The substance of these papers will appear in a forthcoming book to be entitled "Sociological Jurisprudence."

<sup>1</sup> On schools of jurists, reference may be made to Bergbohm, *Jurisprudenz und Rechtsphilosophie*, 3-37; Dahn, *Rechtsschulen*, in his *Rechtsphilosophische Studien*, 132; Dernburg, *Pandekten*, I, §§ 16-17; Windscheid, *Pandekten*, I, §§ 7-10; Bryce, *Studies in History and Jurisprudence*, Essay XII; Pollock, *Oxford Lectures*, 1-36; Lightwood, *The Nature of Positive Law*, ch. 11-14. See also Bluntschli, *Die neueren Rechtsschulen der deutschen Juristen*; Bekker, *Ueber den Streit der historischen und der filosofischen Rechtsschule*.

<sup>2</sup> Acollas, *L'Idée du droit* (2 ed. 1889); *Introduction à l'étude du droit* (1885). Cf. Beaussire, *Les principes du droit* (1888), Introduction.

<sup>3</sup> See Campbell, *The Science of Law according to the American Theory of Government*, 1887; Smith, *The Law of Private Right*, 1890 (see particularly Part III, ch. 3); Hughes, *Datum Posts of Jurisprudence* (1907); Andrews, *American Law* (2 ed.), 1908 (see vol. I, §§ 103-104, 112). Cf. Bishop, *Non-Contract Law*, § 85. The statements of Sir Frederick Pollock, *Oxford Lectures*, 33, that "there are even one or two

philosophical jurisprudence during the first half of the nineteenth century,<sup>4</sup> and a Social-Philosophical School, of which there are several varieties, but in which the Neo-Hegelians seem to have the most fruitful program.<sup>5</sup> The historical jurists may be distinguished into a German Historical School, whose method is philosophical (indeed often metaphysical) and historical, and an English Historical School, whose method is comparative and historical. The Analytical School, likewise, has an older and a newer phase. The older type, which adhered to the analytical method exclusively,<sup>6</sup> may be distinguished from a later English school, whose method is historical as well as analytical.<sup>7</sup> Thus it will be noted that there is a marked tendency to abandon the exclusive use of any one method, and to bring these formerly divergent schools into something like accord. In this movement, however, propinquity hitherto has played a curious part. The German Historical School arose in a country dominated by philosophical methods and at a time when the Metaphysical School was at its strongest. Hence its methods were philosophical as well as historical. The English Historical School arose by way of revolt from a predominant analytical school. Hence its methods are comparative and historical, and the representatives of this school have regarded them as supplementary to analytical methods, rather than as self-sufficient.<sup>8</sup> Similarly they have been at one with analytical jurists in their esti-

---

American writers of great ability for whom, as for the German expounders of *Naturrecht*, legal science appears to consist in a perpetual flux of speculative ideas" and that American theoretical work "is mostly akin to that of the [older] German philosophical and historical schools," although denied by Judge Dillon (*Laws and Jurisprudence of England and America*, 144), appear to be well taken as applied to the historical school in this country.

<sup>4</sup> For detailed grouping of jurists from the standpoint of the Metaphysical School, see Ahrens, *Cours de droit naturel* (8 ed.), I, 26-80; Lorimer, *Institutes of Law* (2 ed.), 38; Miller, *Lectures on the Philosophy of Law*, Appendix E. Cf. Mr. Kocourek's note to his translation of Gareis's *Science of Law*, 12.

<sup>5</sup> See Berolzheimer, *Für den Neuhegelianismus*, *Archiv für Rechts und Wirtschaftsphilosophie*, III, 193.

<sup>6</sup> E. g. Markby, *Elements of Law* (1 ed. 1871); Amos, *Systematic View of the Science of Politics* (1872); Holland, *Elements of Jurisprudence* (1 ed. 1880).

<sup>7</sup> Cf. Jenks, *Law and Politics in the Middle Ages*, ch. I. Perhaps Salmon, *Jurisprudence* (1 ed. 1902), represents a philosophical tendency in what is still the Analytical School.

<sup>8</sup> Maine, *Ancient Law* (Pollock's ed.), 6; Jenks, *Law and Politics in the Middle Ages*, 2. In consequence "reconciliation" of analytical and historical jurisprudence has come to be a common-place. See, for example, Taylor, *Science of Jurisprudence*, 22.

mate of philosophical methods.<sup>9</sup> And in America, where eighteenth-century theories of natural law took root in constitutional law through bills of rights and the judicial power over unconstitutional legislation, and the analytical theory has had to contend for recognition, more than one professed adherent of the Historical School shows notable affinities to the older Philosophical School.<sup>10</sup> On the other hand, the influence of the revolt from the Analytical School in England has given to recent analytical jurists a noticeable historical bent,<sup>11</sup> while in Germany, the rise of legislation, instead of creating an analytical school, has merely given an analytical turn to jurists who must be counted still as philosophical or as historical.<sup>12</sup> Moreover the Philosophical School, except in Scotland and in Italy, until the recent revival of interest in philosophy, was almost becoming historical.<sup>13</sup>

<sup>9</sup> Compare with Austin's "Jargon of the Germans," Bryce, *Studies in History and Jurisprudence*, Essay XII (American ed. pp. 609-612); also Mr. Bryce's remarks before the Association of American Law Schools, 31 Rep. Am. Bar Ass'n, 1061, 1063.

<sup>10</sup> E. g. Carter, *Law, Its Origin, Growth and Function*, 133, 637. See Hammond, *Blackstone*, I, 97.

<sup>11</sup> The recent analytical jurists, who correct the conceptions of Austin to accord with the views of historical jurists, have been called "Neo-Austinians." Jethro Brown, *The Austinian Theory of Law, Excursus E.*

<sup>12</sup> A few formulas and definitions from recent German jurists will make this clear. I. Philosophical jurists: "Law is the order (*Ordnung*) based upon autonomous government in a state of civilization" (Berolzheimer, *System der Rechts und Wirtschaftsphilosophie*, iii, 17); "The purpose of all law is a determinate external behavior of men toward men. The means of attaining this purpose, wherein alone the law consists, are norms or imperatives" (Bierling, *Juristische Prinzipienlehre*, i, § 3); "Law is a peaceable ordering (*Friedensordnung*) of the external relations of men and their communities to each other. It is an ordering, *norma agendi*, a regulating through the setting up of commands and prohibitions" (Gareis, *Enzyklopädie und Methodologie der Rechtswissenschaft*, § 5); "Hence the rule armed with force first gives us the conception of law. That which does not possess the guarantee lying in force, cannot be called law" (Lasson, *System der Rechtsphilosophie*, 207); "The legal order is an adjustment through coercion of the relations of human life" (Kohler, *Einführung in die Rechtswissenschaft*, § 1). II. Historical jurists: "Law is the ordering of the relations of life guaranteed (*gewährleistete*) through the general will" (Dernburg, *Das bürgerliche Recht des deutschen Reichs und Preussens*, i, § 16); "But one must bear in mind that the final basis of all law lies in the power of the State. . . . Enacted law and customary law are to be carried back to this same power, the one as expressed, the other as tacit will thereof" (Czyhlarz, *Institutionen*, § 4). Cf. Bergbohm, *Jurisprudenz und Rechtsphilosophie*, 546: "To be positive law and to come into existence historically by being laid down as a binding rule, is simply one and the same thing." The Austinian would not find much to complain of in these formulas.

<sup>13</sup> Prins, *La philosophie du droit et l'école historique*, 8.

We should expect a new school to arise from this breakdown of the older schools, and there are many signs that such an event has taken place. Jurists are coming together upon a new ground from many different starting points. Some of them profess to find this new ground, potentially at least, in the schools from which they set out. But there is much to indicate that instead of a further variation of one of the old creeds, a wholly new creed is framing. The rising and still formative school to which we may look chiefly henceforth for advance in juristic thought, may be styled the Sociological School.

### I. ANALYTICAL JURISPRUDENCE.

The analytical jurist pursues a comparative study of the purposes, methods and ideas common to developed systems of law by analysis of such systems and of their doctrines and institutions in their matured forms.<sup>14</sup> This is one of the oldest and at the same time one of the most recent methods of legal science. Jhering tells us that the beginnings of legal science among the Romans are to be seen in the earliest and crudest form of analysis,<sup>15</sup> which is reproduced exactly in the "putting of differences" and "taking of diversities" so characteristic of the Elizabethan era in our own system. But as a method of jurisprudence this method requires a condition of stability in the legal systems analyzed. Hence it is appropriate to a developed system only, and begins to be employed only as legal systems reach maturity.<sup>16</sup> Moreover, as the growing-point in a matured system is more and more in legislation, the analytical theory of law is imperative or positive. Law is looked

---

<sup>14</sup> See Gray, *The Nature and Sources of Law*, §§ 1-19; Berolzheimer, *System der Rechts und Wirtschaftsphilosophie*, II, 18-20; Bergbohm, *Jurisprudenz und Rechtsphilosophie*, 12-20.

<sup>15</sup> *Geist des römischen Rechts*, III, 11.

<sup>16</sup> In England, analytical jurisprudence begins with Austin, *The Province of Jurisprudence Determined* (1832). In Germany, under the name of *Allgemeine Rechtslehre*, it begins to be important with Binding, *Die Normen und ihre Übertretung* (1872-1877). See Sternberg, *Allgemeine Rechtslehre*, I, § 13 B; Bergbohm, *Jurisprudenz und Rechtsphilosophie*, 17. Perhaps it is significant that the Hungarian Finkey, in his recent historical introduction to jurisprudence (1908), styling himself an adherent of what he calls "the modern positive school of philosophy of Law," puts Austin first among the masters of that school, naming also Jhering, Binding, and Bierling. Barany, *Aus der Ungarischen Rechtsphilosophie*, *Archiv für Rechts und Wirtschaftsphilosophie*, III, 48, 49.

upon as something that is made. In its crudest form, this is expressed in Austin's dogma that a law is a command. To-day under the influence of Binding and Jhering, it commonly takes the form of regarding law as a body of standards or norms established or recognized by the state, or, in another view, originating in society but laid down by the judicial organs of the state.<sup>17</sup> The kernel of it is that law "is a product of conscious and increasingly determinate human will."<sup>18</sup> The characteristics of the analytical school, then, may be said to be:

1. They consider developed systems only.
2. They regard the law as something made consciously by law-givers, legislative or judicial.
3. They see chiefly the force and constraint behind legal rules. To them, the sanction of law is enforcement by the judicial organs of the state, and nothing that lacks an enforcing agency is law.
4. For them the typical law is statute. But the backwardness of legislative law-making in America is reflected in a position taken by American jurists, whose point of view is otherwise analytical, which with respect to legislation is superficially akin to that of the Historical School.
5. Their philosophical views are usually utilitarian or teleological.

Bearing in mind these characteristics of the analytical jurists, the limitations of their method are evident. The adherents of the English Historical School have been active in showing the errors in the conception of law derived from considering developed systems only.<sup>19</sup> But from the sociological point of view we may find a more serious objection in the practical effect of confining juristic study to the analytical method. Analytical jurisprudence is a

---

<sup>17</sup> See Gray, *The Nature and Sources of Law*, § 213. Cf. Jenks, *Law and Politics in the Middle Ages*, 2 : "Despite criticism, Austin's position is unassailable, regarded as a summary of existing facts. What the State wills, that, and that alone, can the individual be compelled to obey." See also Willoughby, *The Nature of the State*, ch. 7.

<sup>18</sup> Munroe Smith, *Jurisprudence*, 37. This statement of Jhering's view cannot be bettered. Compare: "Law is the voluntary and intended work of humanity." Korkunov, *General Theory of Law* (Hastings' transl.), 116.

<sup>19</sup> Perhaps the best answer to these criticisms has been made by Mr. Jenks: "Not only do systems of law change their contents, but the conception of law itself changes with the progress of mankind." *Law and Politics in the Middle Ages*, 3.

general theory of law drawn from Roman and English law.<sup>20</sup> It brings everything to the test of principles obtained from analysis and comparison of those systems. Thus it leads us by one path, just as the historical method leads us by another, to a jurisprudence of conceptions, in which new situations are to be met always by deduction from old principles, and criticism of premises with reference to the ends to be subserved is neglected. In the pursuit of principles there is a tendency to forget that law is a practical matter. The desire for formal perfection seizes upon jurists. Justice in concrete cases ceases to be their aim. Instead, they aim at thorough development of the logical content of established principles through rigid deduction, seeking thereby a certainty which shall permit judicial decision to be predicted in detail with absolute assurance. Kantorowicz puts it thus:

"The prevailing ideal of the jurist is this: A superior magistrate with academic training, he sits in his cell armed only with a thinking-machine, though concededly one of the finest type. The only furniture is a green table, upon which the official code lies before him. One hands him any case you will, actual or hypothetical, and, performing his duty, he is prepared with the help of purely logical operations and a secret technique, intelligible only to himself, to point out with absolute exactness the decision predetermined by the law-giver in the code."<sup>21</sup>

One need not say that it is impossible to realize this ideal. But the attempt to do so, whether upon the basis of a code or upon that of a body of case-law, brings about a mechanical administration of justice which, in the long run, must break down.

Again, however true the imperative theory may be with respect to the manner in which norms are established in matured legal systems, its tendency is to lead law-makers, legislative and judicial, to overlook the need of squaring the rules upon the statute book, or in the reports or doctrinal treatises, as the case may be, with the demands of reason and the exigencies of human conduct in the one case, and with the demands of social progress in the other case. We are told that when contact with the Romans taught Teutonic

---

<sup>20</sup> See the remarks of Bergbohm upon the English analytical jurists. *Jurisprudenz und Rechtsphilosophie*, 333 n.

<sup>21</sup> Gnaeus Flavius, *Die Kampf um die Rechtswissenschaft*, 7. Perhaps it should be said that the "green table" of the original is the German term for what we should call "red tape."

peoples that through the written page they could make and alter the law as well as record it, a ferment resulted. In somewhat the same way, when lawyers perceive they may deduce law from settled premises and peoples discover they may enact law without premises, a ferment ensues. When juristic speculation is merely a discovery of the supposed dictates of universal human reason and legislation is deemed an application of universal principles to particular situations, the former is free to examine its premises and the latter is bound to have premises. But once admit an imperative theory as a theory of law, it becomes also a theory of law-making. When the doctrine is *quod principi placuit legis habet vigorem*, it matters little whether the *princeps* is a Roman emperor, represented by jurisconsults who legislate in his name, or the people of an American commonwealth speaking through the judiciary committees of their legislature. In either case, the feeling that a declaration of the sovereign will suffices to make law will give rise to a mass of arbitrary detail which cannot obtain the force of law in practice.<sup>22</sup> Experience has shown abundantly that rule and order in the administration of justice are best attained by making it possible to measure relations and situations, as they become the subjects of controversy, by reason. To a certain extent, the will of society as to the relations of individuals with each other may be ascertained and declared in advance. But, as a rule, this is possible only along general lines. Hence, for the great mass of causes, the ideals of uniformity and certainty are to be reached by requiring and permitting the magistrate to bring to bear upon them a trained reason and an enlightened, disciplined sense of justice. The imperative theory is a natural concomitant of a period of legislation. But it is not expedient that law-makers adhere to and be governed by it.<sup>23</sup> Nor is it altogether expedient that judges, wielding the common-law power of making binding precedents, have before them consciously a theory that they make law rather than find and declare it.<sup>24</sup> It does not make an imperative theory the "true" theory to

---

<sup>22</sup> See Parker, *The Congestion of Law*, 29 Rep. Am. Bar Ass'n, 383; Burgess, *Some Recent Tendencies in Texas Laws* (address before the Texas Bar Ass'n), 1910.

<sup>23</sup> "The more, however, law comes to be seen to be merely positive, the command of a law-giver, the more difficult it is to put any restraints upon the action of the legislature." Figgis, *From Gerson to Grotius*, 85.

<sup>24</sup> "No judge in England or in the United States ever did need to be told, I think, that he has power to make law, but many judges in England and the United States

show that it expresses what actually takes place in modern law-making. For to no small extent what so takes place does so under the influence of the theory. Law is not like a natural phenomenon whose workings have to be accounted for by observation and discovery of a theory that will fit the facts. What is law depends not merely upon the facts of the past and of the present but also upon the will of those who prescribe and those who administer rules of conduct by the authority of the state; and this will is determined not a little by their theory of what they do and why they do it. The rules are not prescribed and administered for their own sake, but rather to further social ends. An exposition of how they are prescribed and administered is inadequate. The problem is not merely how law-making and law-administering functions are exercised, but also how they may be exercised so as best to achieve their purpose, and what conception of these functions by those who perform them will conduce best thereto. Here, certainly, the pragmatic criterion is sound. The true juristic theory, the true juristic method, is the one that brings forth good works.

## 2. HISTORICAL JURISPRUDENCE.

The historical jurist pursues a comparative study of the origin and development of law, legal systems, and particular doctrines and institutions.<sup>25</sup> This was the last of the three methods to develop, and in recent times has been, perhaps is still, the method most in vogue. Its pioneer is Cujas at Bourges in the first part of the sixteenth century. But the Historical School really begins in

---

have needed to be reminded from time to time, *vi et armis*, of the constitutional and legal restraints binding upon them when engaged in the judicial process of making law; and few indeed have been the judges, especially in the United States, who have shown a sound understanding as to when those restraints are rigid and when they are elastic and flexible. When you say judges only declare pre-existing law, you emphasize those restraints and keep them fresh in the memory better than when you say judges make law." Again: "The 'fiction' that judges only declare law is all that stands between us and a judicial autocracy." Schofield, Uniformity of Judge-Made Law, 4 Ill. L. Rev. 533, 537.

<sup>25</sup> A good critique of the German Historical School may be found in Korkunov, General Theory of Law (Hastings' transl.), 116-122. See also Leonhard, Methods Followed in Germany by the Historical School of Law, 7 Col. L. Rev. 573, 577, 579; Bekker, Recht des Besitzes, § 1; Charmont, La renaissance du droit naturel, 74-94.

the fore part of the nineteenth century with Friedrich Carl von Savigny (1779–1861).<sup>26</sup>

In opposition to the analytical jurist, the historical jurist and the philosophical jurist agree that law is found, not made, differing only with respect to what it is that is found. The philosophical jurist conceives that a principle of justice and right is found and expressed in a rule; the historical jurist, that a principle of human action or of social action is found by human experience and is gradually developed into and expressed in a rule. Hence the Historical School deny that law is a product of conscious or determinate human will. They doubt the efficacy of legislation, in that it seeks to achieve the impossible and to make what cannot be made.<sup>27</sup> They hold that the living organs of law are doctrinal writing and judicial decision, whereby the life of a people, expressed in the first instance in its traditional rules of law, makes itself felt in a gradual development by molding those rules to the conditions of the present.

Hence, in contrast with the Analytical School, the historical jurists may be characterized thus:

1. They consider the past rather than the present of law.
2. They regard the law as something that is not and in the long run cannot be made consciously.
3. They see chiefly the social pressure behind legal rules. To them, sanction is to be found in habits of obedience,<sup>28</sup> displeasure

---

<sup>26</sup> Berolzheimer, *System der Rechts und Wirtschaftsphilosophie*, II, 230–231; Dernburg, *Pandekten*, I, § 17, 2; Lightwood, *The Nature of Positive Law*, ch. 12.

<sup>27</sup> “These propositions [for codes] are connected with a general view of the origin of all positive law which formerly prevailed with the great majority of German jurists. According to this view, under normal circumstances all law consists of enactments, that is, express precepts of the highest power in the State. The science of law has for its subjects nothing more than the content of enacted rules. Accordingly, legislation itself as well as the science of law is held to be of wholly fortuitous and changeable content, and it is considered entirely possible that the law of to-morrow appear wholly unlike that of to-day. According to this theory, a complete statute book is an urgent need, and only in case the statute book is in a defective condition are we under the unfortunate necessity of resorting to customary law as a feeble supplement. . . . Stated summarily . . . [the correct] view is that all law arises in the manner which the prevailing (though not entirely adequate) usage calls ‘customary law’; that is, it is produced first by custom and popular belief, and then through course of judicial decision, hence, above all, through silent, inner forces, and not through the arbitrary will of a law-maker.” Savigny, *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* (3 ed.), 6–7, 13–14.

<sup>28</sup> Maine, *International Law*, Lect. II; Westlake, *International Law*, I, 7.

of one's fellowmen,<sup>29</sup> public sentiment and opinion,<sup>30</sup> or the social standard of justice.<sup>31</sup>

4. Their type of law is custom, or those customary modes of decision that make up a body of juristic tradition or of case law.

5. As a rule, their philosophical views have been Hegelian; partly because the school arose when Hegel's influence was paramount, but partly also because of an intrinsic sympathy.

With reference to the latter point, it has been said that Hegel's philosophy was "exactly the right philosophy for the historical school of law."<sup>32</sup> At any rate, Hegel's philosophy was a philosophy of and for the professional class,<sup>33</sup> and its vogue in the English universities and the prevalence in American juristic thinking of a doctrine hostile to legislation, the agency of social progress in modern democracies, are not without significance.

From the sociological point of view, the chief objection to confining juristic study to the historical method is similar to that first urged above against the analytical method. For the Historical School also works *a priori*. It has deduced from and tested existing doctrines by a fixed, arbitrary, external standard. Having no true philosophical method of their own, as Berolzheimer has pointed out, when the German historical jurists overthrew the premises of the Eighteenth-Century Law-of-Nature School, they preserved the method of their predecessors, merely substituting new premises. They had, he says, neither the capacity nor the desire to put a new philosophy of law in the place of the buried law of nature. They sought the nature of right and of law in historical deduction from the Roman sources, from Germanic legal institutions, and from the juristic development based thereon.<sup>34</sup> In the United

<sup>29</sup> Clark, Practical Jurisprudence, 134.

<sup>30</sup> Rivier, Principles du droit des gens, I, 7; Lightwood, The Nature of Positive Law, 362, 389.

<sup>31</sup> Carter, The Ideal and the Actual in Law, 10.

<sup>32</sup> Erdmann, History of Philosophy (Hough's transl.), III, 328.

<sup>33</sup> See Talbert, The Dualism of Fact and Idea in its Social Implications (1910).

<sup>34</sup> Berolzheimer, System der Rechts und Wirtschaftsphilosophie, II, 4. A sympathetic critic said recently: "But, although the fundamental principles of the historical school were sound, there have been developed within this school certain doctrines and certain tendencies which provoked a wholesome reaction. Of these I must name: (1) Pure positivism; that is the acceptance of everything which has come into the law in earlier times, without any criticism of its value for the present time. (2) An unnatural separation of the German and Roman elements in modern law. . . .

States, this natural law upon historical premises has gone even further. With us the basis of all deduction is the classical common-law — the English decisions and authorities of the seventeenth, eighteenth and first half of the nineteenth centuries. Our jurists have made of this a very *Naturrecht*. They have asked us to test all new situations and new doctrines by it. Indeed many of our courts have gone out of their way to construe statutes by it, and Mr. Carter tells us that it is a wise doctrine to presume that legislators intend no innovations upon this common law, and to assume, so far as possible, that statutes were meant to declare and reassert its principles.<sup>35</sup> More than this, through the power of courts over unconstitutional legislation and the doctrine that our bills of right are declaratory, courts have forced it upon modern social legislation. Thus the leading conceptions of our traditional case law come to be regarded as fundamental conceptions of legal science, and not merely the jurist, but the legislator, the sociologist, the criminologist, the labor leader, and even, as in the case of our corporation law, the business man, must reckon with them. In consequence, when the commissioners on Uniform State Laws, in drafting a uniform commercial law, propose changes of existing rules incidentally, we are told that they are "codifying in the air and will probably do more harm than good to commerce and mercantile law."<sup>36</sup> In the same spirit, a very proper statement of one of the commissioners that he would be ashamed to go before a legislature to present the proposed Bills of Lading Act and, if asked whether it represented the best thought of the time, be forced to say, "No, it does not, but this is the condition of stagnation that existed two years ago," is criticized by a professor of law because the commissioner advocates departure from existing rules which are sustained by the weight of judicial authority in order to restate the law in accordance with ideals of what it should be, although the ideals "accord with business usages or even with what those usages are tending to become."<sup>37</sup> Likewise the attempt to

(3) The overrating of old times in comparison with the history of the last centuries." Leonhard, Methods Followed in Germany by the Historical School of Law, 7 Col. L. Rev. 573, 577.

<sup>35</sup> Law, Its Origin, Growth and Function, 308-309.

<sup>36</sup> Burdick, A Revival of Codification, 10 Col. L. Rev. 118, 123 (quoting Judge Chalmers).

<sup>37</sup> *Ibid.* 126.

put the law of partnership upon a better basis through the proposed partnership act and to bring it into accord with the uniform understanding of business men, is resisted by teachers of law, who insist that the traditional course of judicial opposition to the mercantile view shall be perpetuated in the code.<sup>38</sup> Another example may be seen in the attitude of many of our law teachers toward the codes of procedure. It was natural when these codes were first enacted that judges trained in the traditional system should look upon them with suspicion and incline to restrain the reforms within as narrow bounds as possible. Accordingly in several states what amounted to a system of actions was fastened upon pleading in spite of the code provisions.<sup>39</sup> But when a court, in a jurisdiction where the matter had remained open, refused to take this step backward and, following ample precedent in other jurisdictions,<sup>40</sup> gave effect to the spirit, if not actually the letter, of the code, an eminent teacher of procedure criticized the decision severely, quoting a judicial dictum that "the inherent and essential differences and peculiar properties of actions have not been destroyed, and from their very nature cannot be."<sup>41</sup> The tendency of practising lawyers to regard the doctrines of the system in which they have been trained as parts of the legal order of nature<sup>42</sup> is thus

---

<sup>38</sup> See a note in 23 Green Bag, 220.

<sup>39</sup> Supervisors *v.* Decker, 30 Wis. 624; Rush *v.* Brown, 101 Mo. 586 (following earlier cases in Missouri); Mescall *v.* Tully, 91 Ind. 96. Wisconsin has abandoned this position. Manning *v.* School District, 124 Wis. 84, 91; Baunen *v.* Kindling, 142 Wis. 613. See a note upon this subject in 24 HARV. L. REV. 480.

<sup>40</sup> E. g. White *v.* Lyons, 42 Cal. 279; Rogers *v.* Duhart, 97 Cal. 500; Cole *v.* Jerman, 77 Conn. 374; Gartner *v.* Corwine, 57 Oh. St. 246.

<sup>41</sup> 8 Mich. L. Rev. 315-318, criticizing Cockerell *v.* Henderson, 81 Kan. 335.

<sup>42</sup> For example, as good a lawyer as Mr. Bayard, when Secretary of State, engaged in a controversy with the representatives of a friendly power, and perhaps did them an injustice, because he was unable to conceive of any principle of jurisdiction over crimes other than the territorial theory upon which our common law proceeds. Cutting's Case, Snow, Cases on International Law, 172. See also Marcy's confusion of the rules as to citizenship in the several states of the United States with the rules of international law as to national character. Cockburn, Nationality, 118 *et seq.* Also the attitude of many of our courts toward legislation proceeding upon the theory of criminal jurisdiction in the *forum laesae civitatis*. State *v.* Knight, 2 Haywood (N. C.) 109; State *v.* Carter, 27 N. J. L. 499; dissenting opinion in Hanks *v.* State, 13 Tex. App. 289. In like manner, eminent judges have sometimes taken constitutional provisions in our bills of rights for necessary *fundamenta* of all law, e. g. Miller, J., in Loan Ass'n *v.* Topeka, 20 Wall. (U. S.) 655, 662. This attitude of bench and bar is a formidable obstacle both to social legislation and to law reform, as has been shown

reinforced by the almost uncontested supremacy of the Historical School in our institutions of learning.<sup>43</sup> Bluntschli's critique of Savigny points out the vulnerable side of historical jurisprudence:

"The critical examination of the past is necessary in order to discover the grounds upon which we rest, but the consideration of the future is none the less necessary in order to determine whither we are going. All law is truly of the present; the past is no more, except in so far as its forces operate in the present; and the future is not yet, except in so far as it is already a condition in the present. The present is, therefore, a union of the past and future. It alone is real. There is something that is often not sufficiently recognized by the Historical School."<sup>44</sup>

Moreover, it is only true in part that law represents principles of human action found by experience and developed into rules. Quite as often it represents juristic development of the analogy that chanced to be at hand when the institution or doctrine was formative. Having taken that line, juristic thought will be found adhering to it with remarkable persistency, often in the face of convenience and of the experience of the community. The case of the law of partnership, referred to above, may be instanced. When Roman lawyers were first called upon to work out a theory of partnership, the analogy nearest at hand was the *consortium* of a family which, after death of the *paterfamilias*, retained an undivided inheritance.<sup>45</sup> Accordingly, the business partnership was assimilated

---

recently in the decision of the New York Court of Appeals upon the Employer's Liability Act. Girard has noted a like tendency of practitioners in France to regard the law of a given moment "as an immutable and eternal product." Manuel élémentaire de droit romain (4 ed.), 6.

<sup>43</sup> See, for instance, the observations of the greatest of our historical jurists with respect to "unwarranted assumption of equitable powers" by our courts of law and equity jurisdiction (not separate courts of law only) in legal proceedings. 2 Ames, Cases on Equity Jurisdiction, 280, note 1; Cases on Partnership, 489, note. Also the note in 4 HARV. L. REV. 394-395, speaking of the distinction between law and equity as "fundamental" and "eternal." Yet the law long ago took over equitable estoppel, the whole field of quasi-contract, with all equitable doctrines applicable thereto, the equitable defense of non-performance by a plaintiff of his side of a bilateral contract, failure of consideration, and many other equitable defenses; and the progression from equity to law has been remarked frequently. Millar, Historical View of English Government, quoted in 1 Spence, History of the Equitable Jurisdiction of the Court of Chancery, 416. Why must we insist that all power of growth in this regard came to an end in the eighteenth century?

<sup>44</sup> Geschichte der neueren Staatswissenschaft, 625, translated by Willoughby, Nature of the State, 158.

<sup>45</sup> See Salkowski, Institutionen, § 144.

to the old relations of common ownership and the law persisted in the line so drawn for it after the newer and better analogy of the juristic person had developed. It was very hard for Roman jurists to depart from the analogy of the *consortium* of co-heirs, so that Scaevola held equality of contribution, profit and loss necessary to the very idea of partnership,<sup>46</sup> and the Roman law insisted to the end that the property was joint property, that the debts were individual debts, and the causes of action individual claims of the individual partners. The modern law preserves much of this in the civil codes.<sup>47</sup> But the commercial codes have come to treat mercantile partnerships as entities.<sup>48</sup> Unhappily the common law, instead of following the custom of merchants, drew its ideas from the civilians, and so represents not the experience of Anglo-American merchants, but the influence of Dutch and French treatises on the formative Anglo-American commercial law,<sup>49</sup> and thus indirectly, a juristic tradition from republican Rome. Indeed it has been recognized repeatedly that law represents commonly not customary modes of popular action, but customary modes of judicial decision or juristic thinking, rooted in either case in a purely juristic tradition.

### 3. PHILOSOPHICAL JURISPRUDENCE.

The philosophical jurist studies the philosophical and ethical bases of law, legal systems, and particular doctrines and institutions, and criticizes them with respect to such bases.<sup>50</sup> This method

<sup>46</sup> Inst. III, 25, § 1. Cf. Dig. XVII, 2, 30.

<sup>47</sup> French Civil Code, Arts. 1802, 1803; German Civil Code, §§ 705, 715.

<sup>48</sup> German Commercial Code, §§ 114, 124, 126.

<sup>49</sup> See the reliance on Puffendorff in *Waugh v. Carver*, 2 H. Bl. 235. Story, Partnership, § 2, takes his whole theory from civilians, quoting Pothier, Puffendorff, Domat and Vinnius.

<sup>50</sup> "Economics and law are related as content and form, as kernel and shell. Accordingly, the object of philosophy of law is the idea of the just on its formal side; the object of the philosophy of economics is the idea of the just according to its content." Berzelzheimer, *System der Rechts und Wirtschaftsphilosophie*, II, viii. "The problem of the philosophy of law is to comprehend the existing law in its rational internal connection and its connection with the other orderings and phenomena of life." Lasson, *System der Rechtsphilosophie*, § 2. "Philosophical jurisprudence (*philosophische Rechtswissenschaft*) has for its object the idea of right and law, the conception of right and law, and the realization thereof." Hegel, *Grundlinien der Philosophie der Rechts*, § 1. "Philosophy of Law sets up the ideal for the legal order

is one of the oldest and in the modern world is the longest-continued method of legal science. The very beginnings of legal science may almost be said to lie in the contact of Roman lawyers and Greek philosophers in the later years of the Roman republic; in that combination of comparative law and rational speculation called the *ius gentium*,<sup>51</sup> in the appeal to reason against traditions and forms called the *ius naturale*. In the modern world, it begins at least with the seventeenth century. Indeed, the legal science of the seventeenth and eighteenth centuries was entirely philosophical. In the nineteenth century, along with all things philosophical, it fell into disrepute.<sup>52</sup> But a reaction has set in, and in Germany

which is to be established practically, but does not set up any law having actual authority. There is no natural law with force to derogate from the positive law. The contrary idea in all its shades is only a result of confusing what ought to be with what is. The law which actually obtains, recognized as such, will always be incomplete; but it is always law. The true philosophy of law does not stand over against the existing law as something revolutionary, denying its authority, but only incites to reforms which correspond to the idea. But it is no mere history of law. It does not explain why and how the law which actually exists has become what it is and not something else, but it criticizes the law from the ethical standpoint, and sets forth its ethical, but not its historical basis." Geyer, Geschichte und System der Rechtsphilosophie, § 2. "What is meant by Philosophy of Law? The primary and most simple idea is that it is the philosophical part of law, that is, the rational element which enters into the complex formation of the legislation of every nation. This science, then, may be called also 'rational law.' In practice it is still often called by the name of 'natural law' which is opposed to the term 'positive law,' the latter designating the special laws of each people. Positive law having been defined as the aggregate of rules formulated by a law-maker and sanctioned by an external constraint, rational law should be conceived as the aggregate of rules which, in the eyes of reason, *ought* to be sanctioned by an external constraint. It is the ideal of the positive law, the type which the law-maker ought to realize, and almost always pretends to realize. . . . The special science which may be called properly the philosophy of law is 'the science of the just; the abundant and fertile development of the idea of absolute justice, which lies in every human soul, and its application' to the diverse relations with which man is surrounded." Boistel, Cours de philosophie du droit, §§ 1, 2 (1899).

<sup>51</sup> "On the one hand there is the pure philosophical standpoint from which the *ius gentium* is surveyed. We investigate the ultimate material sources of the given law in general; and in that we recognize that a part, called *ius civile*, rests purely upon establishment by the state, another part, called, therefore, *ius naturale*, upon the highest jural truth. We recognize also in the *ius gentium* this absolute jural material positively realized, this real *ius naturale*. On the other hand there is the purely positive-law standpoint, furnished by comparative jurisprudence, from which the *ius gentium* is used to support the decision in question." Voigt, Das Ius Naturale, Aequum et Bonum, und Ius Gentium der Römer, I, 399-400.

<sup>52</sup> "To speak of philosophy of law passed for obsolete and out of fashion." Kohler, Lehrbuch der Rechtsphilosophie, 6 (1909).

the philosophical method is regaining, if it has not fully regained, its standing. In France and Italy it was not abandoned, and in France especially it is vital and vigorous.<sup>53</sup>

In comparison with the analytical and the historical jurists respectively, the philosophical jurists —

1. Are more apt to consider the ideal future of law than its past or present.
2. While agreeing with the historical jurist that law is not made but is found, yet in general believe that when found its principles may, and, as a matter of expediency, should be stated definitely and in certain form.
3. Look at the ethical and moral bases of rules rather than at their sanction.
4. Have no necessary preference for any particular form of law.
5. Hold very diverse philosophical views, so that, in a way, there is not so much a philosophical school as a group of philosophical schools.

It is not easy to induce the Anglo-American lawyer or legal scholar to consider the philosophical method seriously. But it is to be remembered that the discredit which attaches to it in England and America comes from taking the metaphysical method of the first half of the nineteenth century for philosophical jurisprudence. By way of reaction from the over-strained idealism of the first part of the nineteenth century and in consequence of the failure of the attempt to explain everything "in a speculative-metaphysical way by a spiritual-logical principle," in the second third of that century "philosophy lost confidence in itself and was subjected to popular contempt."<sup>54</sup> Metaphysical juristic speculation of the same type fell into deserved contempt a little later, and the eminent English authorities who have maintained that jurisprudence and the philosophy of law have no connection<sup>55</sup> speak for that period. But attempting to construct abstract systems by reasoning from assumed first principles is not the final form of

<sup>53</sup> Salleilles, *École historique et droit naturel d'après quelques ouvrages récents*, *Revue trimestrielle de droit civil*, 1902, I, 80; Ehrhardt, *La crise de philosophie de droit*; Demogue, *Les notions fondamentales du droit civil*, 21; Charmont, *La renaissance du droit naturel* (1910).

<sup>54</sup> Paulsen, *Introduction to Philosophy* (Thilly's transl.), preface (p. xiv).

<sup>55</sup> Pollock, *Essays in Jurisprudence and Ethics*, 25 (1882); Pollock and Maitland, *History of English Law*, Introduction, 1 ed., pp. xxiv-xxv (1895).

philosophical jurisprudence. Hence, when Mr. Bryce tells us that German jurists of the last half of the nineteenth century left *Naturrecht* to others and were "philosophical in their use of the analytical and historical methods,"<sup>56</sup> he by no means disposes of the Philosophical School. For we are not bound to accept *Naturrecht* as the philosophy of law. It is as unfair to identify the philosophical method absolutely with Krause or Ahrens or Röder or Lorimer as to identify analytical jurisprudence absolutely with the text of Austin. A new generation has shown that it is possible to have a philosophy of the law that is.<sup>57</sup> The discredit which attached to this department of the science is due, then, chiefly to the failure of attempts to make a metaphysical method do the work of all the methods of jurisprudence. As was once true of the analytical method in England, too much has been claimed for the philosophical method and often it has been misdirected sadly. For a time Austin was followed so blindly that there seemed danger presently he would be abandoned no less blindly. The present Anglo-American attitude toward the philosophy of law has its counterpart in the phase of juristic thought from which we have happily emerged, in which it was fashionable for every dabbler in jurisprudence to have his fling at Austin.

Even when misdirected and overworked, the rationalizing in-

<sup>56</sup> Studies in History and Jurisprudence (American ed.), 634. Korkunov, who shows many traces of English influence, likewise conceives of the philosophy of law as necessarily identical with the metaphysical jurisprudence of the nineteenth century, defining it as "the metaphysical science of absolute legal principles." General Theory of Law (Hastings' transl.), 31. He conceives that it is an attempt "to establish a science of law by the deductive method." *Ibid.* 7. Even when he wrote, philosophical jurisprudence was getting away rapidly from such notions.

<sup>57</sup> "The modern philosophy of law comes in contact with the natural-law philosophy in that the one as well as the other seeks to be the science of the just. But the modern philosophy of law departs essentially from the natural-law philosophy in that the latter seeks a just, natural law outside of positive law, while the new philosophy of law desires to deduce and fix the element of the just in and out of the positive law — out of what it is and of what it is becoming. The natural-law school seeks an absolute, ideal law, 'natural law,' the law *κατ' εξοχήν*, by the side of which positive law has only secondary importance. The modern philosophy of law recognizes that there is only *one* law, the positive law; but it seeks its ideal side and its enduring idea." Berolzheimer, System der Rechts und Wirtschaftsphilosophie, II, 17. Compare Wallaschek's formula, "the science of juristic thought," Studien zur Rechtsphilosophie, 107, and Kohler's position that the province of philosophical jurisprudence is philosophical study of the evolutionary processes by which law is formed. Holtzendorff, Enzyklopädie der Rechtswissenschaft (6 ed.), 9.

fluence of the philosophical method has been invaluable. In civilized countries, men are compelled to administer justice by formulas. These formulas are designed to express ideas of right and justice and as a means to promote right and justice. But there is always danger that we forget those ideas and lose sight of those ends and treat the formulas as existing for their own sake. Since the time of the Stoics, men have appealed to "Nature" to save ethical, political, and juristic thinking from this danger; and by "Nature" they have meant reason and general principles of right. The appeal to reason and to the sense of mankind for the time being as to what is just and right, which the philosophical jurist is always making, and his insistence upon what ought to be law as binding law because of its intrinsic reasonableness, have been the strongest liberalizing forces in legal history.<sup>58</sup>

Philosophical method has an important function also in supplementing the analytical and the historical methods in testing the apocryphal reasons worked out in later times to explain or justify the rules of the past. Analytical jurists and historical jurists often do a good service by exposing these "reasons" and ridding us of them.<sup>59</sup> But each too often is to be found developing by analogy rules which deserve to be forgotten or putting reasons under rules to bolster them up, when they ought to be allowed to fall.<sup>60</sup> Each is not unlikely in particular cases to "adduce a good reason for a bad thing and suppose he has in that way justified it."<sup>61</sup> It is only by criticism from the standpoint that rules of law are expressions or illustrations of principles of right and justice that these tendencies may be kept down. Moreover a naïve philosophy of law will be found behind the juristic thinking of most of those who affect to despise philosophical jurisprudence. This is very noticeable in the natural law of the practising lawyer, examples of which

<sup>58</sup> On the idea of right as a source or creative agency of law, in that it is always critical of existing law, see Del Vecchio, *Il sentimento giuridico* (2 ed. 1908).

<sup>59</sup> Professor Gray considers that this is the chief service of analytical jurisprudence and that its most valuable function is negative. Some Definitions and Questions in Jurisprudence, 6 HARV. L. REV. 21, 23.

<sup>60</sup> Savigny's ingenious argument for the Roman doctrine as to legacies upon impossible or illegal conditions precedent is a case in point. This doctrine, based wholly, in its origin, on Roman abhorrence of intestacy at a time when the rules of law as to intestate succession were grossly inequitable, is abandoned in modern codes. See my paper in 3 ILL. L. REV. 1, particularly pp. 5, 8, 10-11, 23.

<sup>61</sup> Hegel, *Grundlinien der Philosophie des Rechts* (2 ed.), 291 (Dyde's transl. p. 81).

abound in our judicial decisions.<sup>62</sup> But analytical jurists and historical jurists, who were avowed enemies of the philosophical method, have been convicted of a natural law of their own more than once.<sup>63</sup> So long as jurists are influenced by philosophical views of law and of legal doctrines, it is better that they hold them consciously and set them forth expressly.

On the other hand the philosophical method in the past has proved to be liable to three abuses. In common with all methods of jurisprudence, it is not unlikely to be employed in too mechanical a fashion. In philosophical jurisprudence this tendency takes

<sup>62</sup> For instance in a recent judicial discussion of admission to the bar, the court, looking at the matter solely from the point of view of the individual applicant and disregarding all social interest in the matter, said: "There is a law higher in this country, and one better suited to the rights and liberties of the American people,—that law which accords to every citizen the natural right to gain a livelihood by intelligence, honesty and industry in the arts, the sciences, the professions, or other vocations." *In re Leach*, 134 Ind. 665. Another court tells us that the right to take property by will is an absolute and inherent right, not depending upon legislation. *Nunemacher v. State*, 129 Wis. 190, 198–203 (1907). Another court says that a right of privacy, the existence whereof many of our courts deny, "is derived from natural law"; that it "has its foundation in the instincts of nature . . . consciousness being the witness that can be called to prove its existence." Cobb, J., in *Pavesich v. Life Ins. Co.*, 122 Ga. 190, 194 (1905). Compare *Jeffers v. State*, 33 Ga. 367; *Lanier v. Lanier*, 5 Heisk. (Tenn.) 572; the notion that "natural rights" as well as constitutional provisions limit the police power, Field, J., in *Butchers Union Co. v. Crescent City Co.*, 111 U. S. 746, 762; also the notion of individual rights, apart from constitutional restrictions "beyond control of the State," Miller, J., in *Loan Ass'n v. Topeka*, 20 Wall. (U. S.) 655, 662, and of property rights "going back of all constitutions," Harlan, J., in *Chicago, B. & Q. R. Co. v. Chicago*, 206 U. S. 226, 237; the notion of a fundamental theory of legislation of intrinsic validity, to be read into constitutions, O'Brien, J., in *People v. Coler*, 166 N. Y. 1, 16, (1901); the notion of "natural incapacities" (in the event always those recognized at common law) to which the legislature cannot add new ones based merely on the *facts* of modern industrial conditions. *State v. Loomis*, 115 Mo. 307, 315 (1893); *State v. Goodwill*, 33 W. Va. 179 (1889); *Frorer v. People*, 141 Ill. 171, 186 (1892); the idea that the legislature cannot determine that certain industries which employ laborers are dangerous, announced recently by the New York Court of Appeals.

What is said by Marshall, C. J., in *Fletcher v. Peck*, 6 Cranch (U. S.) 87, as to "general principles which are common to our free institutions" having force superior to legislation, and the observations of Iredell, J., in *Calder v. Bull*, 3 Dall. (U. S.) 386, are in another category. They belong to the period of eighteenth-century natural law and represent the best thought of their time.

<sup>63</sup> Pollock, Oxford Lectures, 15–16 and note 1 on p. 16; Bekker, *Recht des Besitzes*, 6; Bergbohm, *Jurisprudenz und Rechtsphilosophie*, 499–500. The latter styles the philosophy of the Historical School an "anonymous natural law." Kohler styles Austin and Holland "Englischen Naturrechtler," Holtzendorff, *Enzyklopädie der Rechtswissenschaft* (6 ed.), I, 12.

the form of over-abstractness, of a purely abstract right and justice, which, instead of resulting in a healthy critique of dogmas and institutions or at least providing material therefor, leads to empty generalities, thus in effect leaving legal doctrines to stand upon their own basis.<sup>64</sup> This is doubly unfortunate in that we must rely chiefly upon the philosophical jurist to keep us in our course toward right and justice as ends. Again, the philosophical method has led often to ambiguities productive of far-reaching confusion. This has been true particularly of the ideas of natural right and natural law. Much as these ideas have done for the liberalizing of law, they have sometimes undone almost as much in their obstruction of clear juristic thinking.<sup>65</sup> Finally, in common with the other methods of jurisprudence, the philosophical method has been employed to work out specious reasons for doctrines, instead of to criticize them, and thus has sometimes helped to intrench them in juristic thought where a real inquiry into their ethical foundations would have shaken their authority. Such is not infrequently the result when the philosopher whose acquaintance with law is superficial, attempts to deal with concrete legal institutions and relations. He learns quickly that there is danger in criticism, and turns to ingenious justification. A notable instance may be seen in Hegel's attempt to justify the unworkable doctrine of *laesio enormis*. He says:

“By the very conception of contract a *laesio enormis* annuls the agreement, since the contractor in disposing of his goods must remain in possession of a quantitative equivalent. An injury may fairly be called enormous if it exceeds half the value.”<sup>66</sup>

---

<sup>64</sup> “For the schematism of the fundamental conceptions of law must always be filled out with some sort of content. In the days of natural law, it contained a mere pseudo-content by means of the contract theory. Legal conceptions seemed to stand upon their own basis; the form supplied the place of the content.” Berolzheimer, System der Rechts und Wirtschaftsphilosophie, I, vii. See Pollock, Essays in Jurisprudence and Ethics, 28–30.

<sup>65</sup> Natural right, it has been said aptly, is “an ambiguous way of saying what might be less ambiguously expressed by a direct use of the term ‘ought.’” Ritchie, Natural Rights, 75. See Lord Russell’s remarks on the consequences of employment of the natural-law method in modern international law. International Law and Arbitration, 19 Rep. Am. Bar Ass’n, 253, 268. Also the observations of Sir William Vernon Harcourt, Letters of Historicus, 75–78.

<sup>66</sup> Grundlinien der Philosophie des Rechts (2 ed.), 115 (Dyde’s transl., p. 80).

Both the doctrine of *laesio enormis* and the theory of a quantitative equivalent have been abandoned in modern German law.<sup>67</sup> Another circumstance leads to the same abuse of philosophical method. It is in human nature to accept most of the institutions with which one is familiar without much question. Hence we might reasonably expect that in any system of natural law nature would be found to dictate, for the greater part, the institutions with which the individual jurist who interpreted nature was familiar and under which he had grown up. Such has been the event. In nearly every case, for the Continental jurist of the seventeenth and eighteenth centuries, natural law meant an ideal development of the principles of the Roman law, which he knew and had studied. Similarly, for the common-law lawyer by whatever name he may call it, nature means an ideal development of the principles of the common law. Hence we find American jurists working out the applications of common law individualism after the individualist philosophy and economics have lost their momentum, and we find our courts and lawyers insisting upon views of liberty of contract, of risk of employment, and of the fellow-servant rule which are out of all relation to actual life.<sup>68</sup> Few juristic theories have been more barren than the eighteenth-century natural law of American judges in the nineteenth century.

#### 4. RISE OF A SOCIOLOGICAL SCHOOL.—THE SOCIAL PHILOSOPHICAL SCHOOL.

To sum up what has been said with respect to the three methods of jurisprudence, the science of law seems to begin everywhere in the attempt to distinguish cases superficially analogous and to

<sup>67</sup> It is worthy of note that Langdell, proceeding analytically, uses the same principle of equivalency, in treating of conditions in contracts, to reach some obviously unjust results. Summary of Contracts, §§ 106, 109. In the event the decisions have not acquiesced in these results, and a different principle is now invoked.

<sup>68</sup> "We must remember that the injury complained of is due to the negligence of a fellow workman, *for which the master is responsible neither in law nor morals.*" Durkin *v.* Coal Co., 171 Pa. St. 193, 202. "At common law a servant cannot recover from his master for injuries received from a fellow servant acting in the same line of employment. This is a part of that general American common law, *resting upon considerations of right and justice* that have been generally accepted by the people of the United States." Hoxie *v.* New York, N. H. & H. R. Co., 82 Conn. 352, 359-360. See my paper "Liberty of Contract," 27 Yale L. Journ. 454.

establish categories and "differences." From this comparison of rules within the legal system, it is but a step to compare with the rules of other legal systems and to compare systems themselves. This was the theory of the *Ius Gentium*, and doubtless to some extent the practice. It is to be seen in our own law at least as far back as Fortescue,<sup>69</sup> and, though scorned by Coke, was well marked in the seventeenth and eighteenth centuries in the development of equity<sup>70</sup> and the rise of the Law Merchant.<sup>71</sup> The comparative tendency is followed by a philosophical tendency. Law is felt to be reason, and the "artificial reason and judgment of the law," as Coke puts it, is subjected to scrutiny. It is not enough that a rule exist in one system or that it have its analogues in others. The rule must conform to natural — *i. e.*, non-legal — reason, and if it does not, must be reshaped until it does, or must have reasons made for it. This is the dominant idea of the *Ius Naturale*. It is seen in Continental Europe in the period after Grotius. In our law, in crude form, one must confess, it is to be seen in the eighteenth and nineteenth centuries in the giving of "reasons" in which Blackstone and the lecturers on law who followed him in America were so prolific. To this philosophical tendency, an analytical tendency succeeds by way of revolt. The validity of the so-

<sup>69</sup> De Laudibus Legum Angliae, chaps. 19–23, 28.

<sup>70</sup> See Spence, Equitable Jurisdiction of the Court of Chancery, I, 413. If Spence's account is somewhat overdrawn, yet resort to the Dutch publicists is well authenticated.

<sup>71</sup> The effect of the growth of trade and commerce upon English law becomes well marked in the time of Lord Holt. At the same time we may note a tendency to treat the authorities of the civil law in a spirit very different from that of Coke. Lord Holt refers to the civilians and to the Roman law many times, *e. g.* Lane *v.* Cotton, 1 Ld. Raym. 646, 652; Knight *v.* Cambridge, 2 Ld. Raym. 1349; Coggs *v.* Bernard, 2 Ld. Raym. 909, 915; City of London *v.* Wood, 12 Mod. 669, 686. Counsel cited the civil law to him and his colleagues very freely, *e. g.* case of the Ambassador of Muscovy, 10 Mod. 4; Assievado *v.* Cambridge, 10 Mod. 77, 78, 79. Wooddesson, Elements of Jurisprudence, lxxix (1792), treats the law merchant as part of the law of nations. In America, the same phenomenon is to be seen in the early part of the nineteenth century. Thus in the first volume of Johnson's reports, reporting decisions of the Supreme Court of New York and the Court of Errors of New York during the year 1806, Pothier is cited four times, Émériton five times, Valin three times, Casaregis twice and Azuni twice. The Institutes of Justinian are cited once. These citations are made by the court. In addition, counsel, so far as their arguments are reported, cite civilians (mostly French) repeatedly. In the seventh volume of the same reports, reporting decisions of the same courts during 1810 and 1811, Pothier is twice cited, Huberus twice, Émériton once and the French civil code once. There are also two citations of the Digest, one of the Institutes and one of the Code. Almost all these citations are in cases involving questions of mercantile law.

called reasons is examined by applying them to analogous cases and by trying how far the logical scope of the reason and the extent of the rule to be explained may be squared. Being for the most part *ex post facto* and, though specious, neither historically sound nor critically adequate, they fall to the ground, and sometimes carry the rules with them. Hence the analytical period usually coincides with a critical tendency and an era of reform through legislation. Such a tendency in the decadence of Roman institutions resulted in much valuable legislation on matters of private law.<sup>72</sup> In Germany such a movement has overthrown the long-dominant Romanism and has brought forth a German code. In our common-law system the analytical tendency coincides with the reform movement, inaugurated by Bentham, the force of which is not yet wholly spent. Along with this analytical tendency, sometimes beginning before it, sometimes after, but as another phase of the revolt from the philosophical, there is an historical tendency. How far we see something of this in the classical Roman law, — in Gaius, for example,<sup>73</sup> — need not be considered. It preceded the analytical tendency in Germany, it followed that tendency in France. In England it seems to have followed. In either event, it completes the exposure of the specious explanations of the preceding period and insures the overthrow of pseudo-philosophy. This done, there is room, and often need for a true philosophical jurisprudence, since the analytical and historical methods, pursued exclusively, lead to the setting up of fixed, arbitrary, external standards and an over-development of the mechanical. On the whole, we may say that analytical jurisprudence is attaining the best results in the present, that historical jurisprudence has accomplished most in the immediate past, and that philosophical jurisprudence, which had been most fruitful from the Reformation till the nineteenth century, but was sterile

<sup>72</sup> See for example the preamble to Cod. VII, 25.

<sup>73</sup> “ . . . I have as a matter of course thought it right to go back for my account of the law of the Roman people to the foundation of the city . . . because I observe that in all subjects a thing is only perfect when it is complete in all its parts, and undoubtedly the most essential part of anything is its beginning. Besides this, if with men who are arguing cases in the forum it is, so to speak, a monstrous thing to set the matter forth to the judge without first making some introductory statement, how much more unsuitable must it be for one who has undertaken to give an exposition to disregard the beginning and omit references to historical causes. . . .” Gaius, on the Law of the Twelve Tables 1, in Digest, I, 8, 1 (Monro's transl.).

during that century, shows signs of regaining its usefulness and reacquiring its former importance in the immediate future. But with the rise and growth of political, economic and social science, even in the closing years of the nineteenth century, the time was ripe for a wholly new tendency, and that tendency, which may be called the sociological tendency, has become well established in Continental Europe.<sup>74</sup>

The first movement in the new direction was from the then dominant historical school in Germany. The Historical School began by applying historical method to the modern Roman law. Next arose a tendency to investigate the legal institutions of all Aryan peoples and to attempt reconstruction of an Aryan *Urrecht* in which the roots of modern law were to be found.<sup>75</sup> At the same time, while the latter movement was in progress, the scope of inquiry widened, an ethnological turn was given to historical jurisprudence, and the foundations of what Kohler styles universal legal history (*Universalrechtsgeschichte*) began to be laid. At first this wider historical jurisprudence was thought of as a comparative ethnological jurisprudence.<sup>76</sup> But it was not long in assuming the name and something of the character of a sociological jurisprudence.<sup>77</sup> The triumph of the Germanists and consequent relegation of Roman law to a distinctly lower position in German legal education began to be felt in turning the energies of jurists and scholars into wider fields of historical research, and a new type of juristic literature, dealing with the legal institutions of all manner of peoples from the comparative<sup>78</sup> and historical standpoints grew to considerable proportions.<sup>79</sup> Even Romanists were affected,

<sup>74</sup> Vaccaro, *Les bases sociologiques du droit et de l'état* (1898); Vanni, *Lezioni di filosofia del diritto* (1902, 8 ed. 1908); Stammler, *Wirthschaft und Recht* (1906); Ehrlich, *Soziologie und Jurisprudenz* (1906); Grasserie, *Les principes sociologiques du droit civil* (1906); Gumplowicz, *Allgemeines Statsrecht* (1 ed. 1877, 3 ed. 1907); Demogue, *Les notions fondamentales du droit privé* (1911); Duguit, *Le droit social, le droit individuel et la transformation de l'état* (1 ed. 1908, 2 ed. 1911); Rolin, *Précédentes à la science du droit* (1911). See Berolzheimer, *System der Rechts und Wirtschaftsphilosophie*, II, § 44.

<sup>75</sup> The best examples are: Leist, *Altarisches Jus Gentium* (1889), and *Altarisches Jus Civile* (1892).

<sup>76</sup> Post, *Bausteine für eine allgemeine Rechtswissenschaft*, (1880) I, § 1.

<sup>77</sup> Post, *Grundlagen des Rechts* (1884). In this work there is an avowed attempt to put jurisprudence on a sociological basis.

<sup>78</sup> Meili, *Institutionen der vergleichenden Rechtswissenschaft* (1898).

<sup>79</sup> The head and front of this comparative jurisprudence was Kohler: Shakespeare

and deemed it necessary to begin a history of Roman law by an investigation of the legal institutions of Babylon.<sup>80</sup>

Meanwhile others had been approaching the same position from the philosophical side. Dahn in 1878, reviewing one of Post's earlier works, said emphatically that a "scientific philosophy of law must be based upon comparative legal study" and that philosophical jurists must not forever draw their materials from the Roman law and certain phases of German legal development, but must make use of the legal life of all peoples.<sup>81</sup> In another paper, reprinted 1883, he foreshadowed the treatment of the conception of law now characteristic of German jurists.<sup>82</sup> The latter lay stress upon the legal order, attained through law, toward which law is a means, and seek to define that legal order rather than to reach a definition of law. Dahn defined law, indeed, but he defined it as an institution of society. A little later Nani,<sup>83</sup> writing in Italy, where the Philosophical School is still paramount, rejected both the historical and the natural-law standpoints, and ranged himself with Dahn, declaring that comparative ethnology and anthropology must be the basis of jurisprudence. These attempts to broaden the philosophical foundation, like the attempts to broaden the historical position which went on at the same time, go along with the earlier stage of social science, before Ward had made it clear that psychology was no less fundamental for sociology than anthropology and ethnology. Wallaschek attempted to

---

vor dem Forum der Jurisprudenz (1884); Rechtsvergleichende Studien über islamisches Recht, etc. (1889); Zur Urgeschichte der Ehe, etc. (*Zeitschrift für vergleichende Rechtswissenschaft*, XII, 187-353). See a note of his papers on various topics of comparative ethnological jurisprudence in Berolzheimer, *System der Rechts und Wirtschaftsphilosophie*, II, 405, n. 3. Next stands Post, *Die Geschlechtsgenossenschaft der Urzeit und die Entstaltung der Ehe; Beitrag zu einer allgemeinen vergleichenden Staats- und Rechtswissenschaft* (1875); *Ethnologische Jurisprudenz* (1880); *Studien zur Entwicklungsgeschichte des Familienrechtes; Beitrag zu einer allgemeinen vergleichenden Rechtswissenschaft auf ethnologischen Basis* (1890); *Über die Aufgaben einer allgemeinen Rechtswissenschaft* (1891). See also Willutzky, *Vorgeschichte des Rechts* (1903). Compare a similar tendency in the English Historical School to broaden the foundation of historical jurisprudence by a "method of inductive generalization on the basis of historical and ethnographical observation." Vinogradoff, *The Teaching of Sir Henry Maine*, 18. This conception is approved by Professor Lefroy, *Jurisprudence*, 27 L. Quar. Rev. 180.

<sup>80</sup> Ehrenberg, preface to Jhering, *Vorgeschichte der Indo-Europäer*, vi (1894).

<sup>81</sup> Zur Methode der Rechtsphilosophie, *Rechtsphilosophische Studien*, 288.

<sup>82</sup> *Rechtsphilosophische Studien*, 119.

<sup>83</sup> Vecchi e nuovi problemi del diritto (1886).

broaden the philosophical position by approach to the analytical standpoint. He asserted that the philosophy of law is "the science of juristic thought" and insisted that it was to be found in the actual methods of jurists.<sup>84</sup> Here again, however, Kohler has been the leader. Professing to follow Hegel, but in reality, perhaps, merely taking his clew from a remark of Hegel's that right and law are phenomena of culture, he developed and limited the new movement in philosophical jurisprudence so as to set off the philosophy of law from history and anthropology on the one hand and from analysis of matured systems of law on the other, and yet give it an intimate relation to each.<sup>85</sup> He defined its province as philosophical study of the evolutionary processes by which law is formed. Thus in his view historical and philosophical jurisprudence are merged in a social-philosophical jurisprudence, and lose their identity.

No doubt the movement was accelerated by the influence of the comparative idea in other branches of learning. In the latter part of the nineteenth century great things were expected from this method on every hand. Freeman went so far as to say that "the establishment of the comparative method of study has been the greatest intellectual achievement of our time."<sup>86</sup> For a time it was thought that the comparative method in jurisprudence would supersede all others, and exaggerated claims are still made for it.<sup>87</sup> But the analytical and historical methods, so far as they are methods of jurisprudence, must be comparative. Legal history, the discovery and exposition of the actual course of development of a particular legal system or of a particular doctrine in a particular system, is not historical jurisprudence. The English analytical and historical schools used the comparative method from the beginning. On the Continent, the Germanic law had been arrested

<sup>84</sup> *Studien zur Rechtsphilosophie* (1889). See especially p. 107. Schuppe carried this even further. *Rechtswissenschaft und Rechtsphilosophie*, *Jahrb. der internationale Vereinigung für vergleichende Rechtswissenschaft*, I, 215 (1896).

<sup>85</sup> See in particular *Rechtsphilosophie und Universalrechtsgeschichte* (in Holtzendorff, *Enzyklopädie der Rechtswissenschaft* (6 ed. vol. I), 9, 14, 17, 20 (1902)).

<sup>86</sup> *Comparative Politics*, 1 (1873).

<sup>87</sup> Bryce, *Studies in History and Jurisprudence*, Lect. XII; Kohler, *Rechtsphilosophie und Universalrechtsgeschichte* (in Holtzendorff, *Enzyklopädie der Rechtswissenschaft* (6 ed. vol. I), 14. See Berolzheimer, *System der Rechts und Wirtschaftsphilosophie*, II, 21; Schuppe, *Die Methoden der Rechtsphilosophie*, *Zeitschrift für vergleichende Rechtswissenschaft*, V, 209.

in its development in the fourteenth and fifteenth centuries. Hence at first there was not the stimulus to comparison with another matured system which was at hand in England. Moreover, Continental jurists, living under a system which showed a continuous written history extending back almost to the Twelve Tables, had to do with a body of law four times purged of its archaisms, whereas in England in the middle of the nineteenth century, with but six centuries of legal history as a system, the law was overhauling for the second time, in the legislative reform movement, in the endeavor to rid it of the *incubus* of the past. Thus there was every reason for the English historical jurist to look into the development of another system, older than his own, which had passed through the stages of remarking by equity and by legislation and to consider archaic systems analogous to that out of which his own had developed at a period by comparison so recent. For the same reason, when Continental jurists began to employ comparative methods, the change appeared revolutionary. But the result has been simply that historical and philosophical methods are now employed comparatively. There is a more scientific use of the old methods rather than a new method. Indeed, a purely comparative method, apart from analysis or history or philosophy, would be barren. Savigny said of a like notion that the task of the Continental jurist should be to compare the practical rules of the classical Roman law with those worked out on a Roman basis in the Middle Ages and in modern Europe:

“A few isolated cases excepted, the matter lies too deep to admit of being disposed of by such a selection between contrasted practical rules, and a work which sought to carry out this comparative point of view into particulars, would remind one of the frame of mind of a child, who, when the histories of battles are related to him, is always inclined to ask which were the good and which the bad.”<sup>88</sup>

Using the term in a broad sense to include all jurists whose methods are primarily or avowedly philosophical, it was suggested at the outset that the Philosophical School on closer scrutiny fell into three. These three groups represent the philosophy of law of the eighteenth, nineteenth and twentieth centuries respectively. Rousseauists in France and in America, publicists of the older type in

---

<sup>88</sup> System des heutigen römischen Rechts, I, preface (Holloway's transl., p. vii).

America, and Anglo-American lawyers bred on the introductory chapters of Blackstone make up nearly the whole of the first group. The second group, the Metaphysical School, has modern representatives in Scotland,<sup>89</sup> in Italy,<sup>90</sup> in France,<sup>91</sup> and possibly in a few Krauseans and a few Hegelians in Germany.<sup>92</sup> The third group, which may be called the Social-Philosophical School, presents three types, the so-called Neo-Kantians, who, on the whole, are philosophical and sociological in tendency, the teleologists or social utilitarians, whose tendency is analytical and sociological, and the Neo-Hegelians, who may be described as historical and sociological in tendency. In other words, just as historical jurists are now of two types, the one historical in the older sense, the other sociological, philosophical jurists also are to be recognized as natural-law or metaphysical on the one hand, or social-philosophical (sociological) on the other hand. It is not easy to perceive any real distinction between the advanced types of the two schools. What difference there is comes from the starting-point from which they came to the positions they now occupy. As we understand the term in America, they are more truly sociological in method than many of those who avow themselves adherents of a sociological school. The reason why the former do not call themselves a sociological school may be found in a remark of Professor Small:

" . . . German social science has always carried in solution so much of the assumption of the inter-connection of all human experience — so much more than is in French or English thought — that the Germans did not feel the need of crystallizing this fluid sociology. The Germans

---

<sup>89</sup> E. g. Herkless, *Lectures on Jurisprudence* (1901).

<sup>90</sup> Del Vecchio, *Il concetto della natura ed il principio del diritto* (1908). Ardigo, in the last quarter of the nineteenth century, founded a school of positivist natural law which has many adherents in Italy. See Di Carlo, *Il diritto naturale secondo R. Ardigo ed il positivismo italiano* (1909); Puglia, R. Ardigo ed il moderno positivismo etico giuridico italiano (1898).

<sup>91</sup> Boistel, *Cours de philosophie du droit* (1899), deducing a whole system from a principle of respect for personality. See also Lagorrette, *Le fondement du droit* (1907); Fouillée, *L'Idée moderne du droit* (1878, 6 ed. 1909). The "natural law with variable content" of recent French philosophers of law, who stand for equitable application of legal rules and a free science of law, has only a historical connection with the Metaphysical School. It will be considered in connection with the several types of the Social-Philosophical School.

<sup>92</sup> Hegel's Philosophy of Law was revived by Lasson, *System der Rechtsphilosophie* (1882). See also Rundstein, *Aus der holländischen Rechtsphilosophie*, *Archiv für Rechts und Wirtschaftsphilosophie*, II, 291.

thought, and as a rule still think, that an independent formulation of the interworking of all human experience would be a redundancy in science. There is also more excuse for this position in Germany than elsewhere because, with all their separateness, the different social sciences have come nearer in Germany than anywhere else to co-operation as divisions of a single science.”<sup>93</sup>

Consideration of the relation of the Positivist School to socio-logical jurisprudence must be deferred until the different types of the Social-Philosophical School have been examined more critically.

*Roscoe Pound.*

[*To be continued.*]

HARVARD LAW SCHOOL.

---

<sup>93</sup> *The Meaning of Social Science*, 82.